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No. 90-657

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KEMPER FINANCIAL SERVICES, INC.,

Cross-Petitioner,

v.

JILL S. KAMEN,

Cross-Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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CROSS-PETITIONER'S REPLY BRIEF

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CROSS-PETITIONER'S REPLY BRIEF

Cross-petitioner Kemper Financial Services, Inc. ("KFS") submits this reply brief in support of its conditional cross-petition.

REASONS FOR GRANTING THE CROSS-PETITION IN THE EVENT THAT THE COURT GRANTS THE PETITION IN NO. 90-516

In her response, plaintiff does not even attempt to justify the Seventh Circuit's holding that a Section 36(b) suit is a personal rather than a representative action and that the plaintiff consequently need not be an adequate representative of other shareholders. Nor does plaintiff attempt to support the Seventh Circuit's holding that a shareholder who brings a Section 36(b) suit is an adequate representative of other shareholders so long as her lawyer is competent. As KFS demonstrated in its opening brief (at 6-11), those holdings conflict in principle with established precedents of this and other courts.

Instead, plaintiff challenges several factual statements in KFS's brief and asserts that her interests are not antagonistic

to those of the other shareholders. (Br. in Opp. 1-4.) Plaintiff is incorrect in both respects.

1. Plaintiff asserts that KFS's factual representations are not supported by the record and implies that the facts stated are untrue. (Br. in Opp. 1-3.) Contrary to plaintiff's contention, the facts summarized in KFS's Statement Of The Case are contained in the Fund's December 1, 1986 Prospectus ("Prospectus") and September 17, 1986 Notice of Special Meeting of Shareholders ("Notice"), which were in the Appendix filed by plaintiff's counsel in the Seventh Circuit Court of Appeals, and also are memorialized in the Seventh Circuit's opinion.

The Prospectus and Notice support the statement that "[e]ssentially all of the Fund's accounts are linked with securities trading accounts at brokerage firms." The Prospectus states that "[t]he Fund has been designed for use by financial service firms such as broker-dealers and banks." (Seventh Cir. App. 154.) The Notice (Seventh Cir. App. 178) states:

> The Fund was organized as a money market mutual fund to provide cash management services for clients of broker-dealer firms. These services are currently provided by various financial service firms, including broker-dealers and banks ("firms"). These cash management services include maintenance of accounts and records, effectuating share purchase and exemption transactions, automatic investment of cash balances held in brokerage accounts and assistance and information. Thus, the Fund differs considerably from a "retail" money market mutual fund.

The record, never contested by plaintiff below, is clear that the Fund was designed for, and principally used by, investors with broker-dealer accounts.[1]

Similarly, the record demonstrates that funds associated with broker-dealers have higher expenses than retail money market funds as a result of the additional services provided. The Notice contains substantial discussion of how the securities firms associated with broker-dealer funds require compensation for their services, thereby increasing expenses. (Seventh Cir. App. 178-182.) The Notice also contains a chart, based on data from Lipper Analytical Services, Inc., a well known mutual fund reporting service, showing that broker-dealer funds, on average, have expenses that are greater than those for retail funds. (Seventh Cir. App. 185.) These facts were presented to, and relied upon by, the lower courts. In contrast, the factual findings in *Gartenberg v. Merrill Lynch Asset Management, Inc.*, 694 F.2d 923 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983) and *Krinsk v. Fund Asset Management, Inc.*, 875 F.2d 404 (2d Cir.), *cert. denied*, 110 S. Ct. 281 (1989), which plaintiff now submits to this Court (Br. in Opp. 2), were not relied on below and, in all events, are irrelevant to the case at bar.

Indeed, the Seventh Circuit specifically recognized that most of the Fund's accounts are linked with brokerage-firm trading accounts and that this link increases the expenses incurred by the Fund. The Court observed that (1) the Fund provides a "sweeps feature" and other special services for securities trading accounts: "Brokers offer the Fund to their customers as an adjunct to their principal [trading] accounts" (Pet. App. 1a); (2) because of the "extra costs of implementing a sweeps feature" and the other special services of the Fund, the "Fund pays interest at a rate approximately 0.2% per

---

[1] Of course, there are isolated investors, such as directors who wish to own a small number of shares, who do not have any affiliation with a securities firm.

annum lower than money market funds that operate passively" (Pet. App. 2a); and (3) plaintiff does not use the "sweeps and redemption services the Fund provides," but "most other shareholders" use those services and "believe that the Fund's special services are worth the 0.2% cost" (Pet. App. 26a-27a).

With regard to plaintiff's references to her minimal knowledge about this case (Br. in Opp. 3), plaintiff does not rebut the fact that she essentially was ignorant of the facts and turned the case over to her lawyer. As the Seventh Circuit found, plaintiff's own testimony revealed that she "knew little about either the Fund or the case and had given counsel free reign" to prosecute the action. (Pet. App. 25a.)

Plaintiff's suggestion that the record demonstrates only that she did not use the Fund's services for three years, rather than seven (Br. in Opp. 3), is misleading. Plaintiff does not state, and the record contains no evidence, that she ever used the special services. In fact, she never has done so.

Thus, there is no merit in plaintiff's assertion that KFS's factual summary is incorrect.

2. In arguing that "there is no conflict of interest between plaintiff and the other shareholders" (Br. in Opp. 4), plaintiff ignores the fact that the due process clause prohibits her from advocating a position that is opposed to the expressed interest of the persons she purports to represent. *E.g., Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940); *Dierks v. Thompson*, 414 F.2d 453, 456 (1st Cir. 1969). The Seventh Circuit in this case acknowledged that "most other shareholders believe that the Fund's special services are worth the 0.2% cost." (Pet. App. 26a.) Plaintiff advocates the exact opposite position — that the Fund's special services are not worth the cost. That assertion forces the other shareholders to bear the Fund's legal expenses and loss of management and director time and effort in defeating plaintiff's unwarranted and unwanted challenge. Due process forbids that result.

Nor can plaintiff's inadequacy be solved by treating plaintiff's lawyer as the true class representative. (Pet. App. 25a.) Plaintiff's lawyer is subject to the same constraints, and he cannot advocate a position different from that desired by his clients — the other shareholders. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 549 (1949).

Contrary to plaintiff's contention that "it is unnecessary to reach the constitutional question" (Br. in Opp. 5), this whole case is premised on an important constitutional issue concerning plaintiff's adequacy. If this Court grants review in No. 90-516, it also should grant review with respect to this issue.

CONCLUSION

If this Court grants the petition in No. 90-516, this cross-petition also should be granted.

Respectfully submitted,

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